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No. 89-1303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RESERVE LIFE INSURANCE COMPANY,
Petitioner,

v.

PATRICIA STEPHENSON EICHENSEER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AETNA CASUALTY AND SURETY COMPANY IN SUPPORT OF PETITIONER

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MOTION OF THE AETNA CASUALTY AND SURETY COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, *amicus*, The Aetna Casualty and Surety Company ("Aetna"), hereby moves for leave to file the attached brief *amicus curiae*. Petitioner has granted but respondent has refused to grant consent for Aetna to file a brief *amicus curiae* in support of the petition.

Aetna has been an active participant in efforts to convince the legislatures of the several States to enact

precise, rational controls over their respective punitive damage systems. Aetna also has been the victim of a retrospective federal common law tort of bad faith, created out of whole cloth by a federal district court at the behest of a federal agency. *Aetna Casualty & Surety Co.* v. *FDIC*, No. 89-5866 (6th Cir. argued Feb. 5, 1990). Aetna believes that it is in a position to bring to this Court's attention relevant matters that could not be brought fully to the Court's attention by petitioner and that respondent is unlikely to bring to the Court's attention.

In particular, Aetna brings to the Court's attention in the attached brief information which demonstrates that the enactment of so-called tort "reform" statutes by a number of States since 1986 has done very little to address the arbitrary, standardless and open-ended nature of the punitive damage systems of most jurisdictions. The vast majority of States, including Mississippi, have yet to place any limit on the amount of punitive damages that may be imposed against a defendant in a bad faith (or any other) action. Moreover, none of these statutory enactments prohibit, or attempt to limit in any fashion, the retrospective imposition of punitive damages based upon newly formulated standards of conduct. Aetna believes that the inadequacy of the legislative response to the fundamental defects of state punitive damage systems should be fully understood by the Court as it considers whether to grant review of this case and decide the important due process questions left unresolved in the Court's recent decisions involving federal constitutional challenges to punitive damage awards.

Aetna therefore respectfully requests leave to file the attached brief *amicus curiae*.

March 14, 1990 Respectfully submitted,

/s/ Jane E. Kelly

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QUESTION PRESENTED

In considering whether to grant review in this case, the Court should evaluate the extent to which Mississippi and other States have responded adequately to this Court's suggestions in prior cases that the States ought to act to reform their respective punitive damage regimes that have, over the past decade, led to the imposition of increasingly frequent, larger and essentially unrestricted and unpredictable punitive damage awards. *Amicus curiae* will address the following question:

> Whether the enactment of so-called tort "reform" statutes by a number of States since 1986 should dissuade the Court from addressing the serious constitutional deficiencies in the punitive damage systems of most jurisdictions.

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BRIEF *AMICUS CURIAE* OF THE AETNA CASUALTY AND SURETY COMPANY IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

This case concerns the due process limits on the power of judges and juries to impose punitive fines in unpredictable and unrestrained amounts under the punitive damage regimes in place in the several States. Specifically, this case brings before the Court two characteristics of punitive damages that are both common to most jurisdictions and have, by and large, escaped the corrective action of the States since this Court suggested in *Bankers Life and Casualty Co.* v.

Crenshaw, 108 S. Ct. 1645 (1988), that the States take steps to correct abuses in their punitive damage systems.

The first characteristic is that severe punishment is often imposed on defendants for conduct identified as wrongful only after the fact. Because the vast majority of punitive damage awards are imposed for conduct declared wrongful by state courts in their constantly evolving redefinition and expansion of rights and obligations under common law, the opportunity to inflict punishment in the form of punitive damages for conduct not previously declared to warrant punishment arises frequently and is almost as frequently exercised. As Judge Jones put the matter in this case, "neither Reserve Life nor most of the dozens of insurers who have been attacked by this new Mississippi tort have had adequate notice of the conduct that could result in punitive damage awards." Pet. for Cert., App. F, 74a (Jones, J., dissenting from den. of Sugg. for Reh. *En Banc*).

The second characteristic of the punitive damage "system" that "mocks our notions of fundamental fairness," *id.*, is that judges and juries have, with few exceptions, virtually unfettered discretion over the amount of punitive damages to award.

Amicus curiae, The Aetna Casualty and Surety Company ("Aetna"), has been an active participant in efforts to convince the legislatures of the several States to enact precise, rational controls over their respective punitive damage systems. Aetna also has been the victim of a retrospective federal common law tort of bad faith, created out of whole cloth by a federal district court at the behest of a federal agency. *Aetna Casualty & Surety Co.* v. *FDIC*, No.

89-5866 (6th Cir. argued Feb. 5, 1990). Aetna believes that it is in a position to bring to this Court's attention relevant matters that could not be brought fully to the Court's attention by petitioner and that respondent is unlikely to bring to the Court's attention.[1]

STATEMENT OF THE CASE

This case presents the question left for another day in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989): Whether the Due Process Clause of the Fourteenth Amendment acts as a check on the fact-finder's unrestrained discretion to award punitive damages in the absence of an express statutory limit. This case also presents the question whether due process permits the imposition of such unrestrained punishment for conduct not declared punishable when it occurred. Because Mississippi statutory and common law place no limit on the amount of punitive damages that may be imposed against a defendant in a bad faith (or any other) action, the punitive damage award in this case is the product of an arbitrary civil punishment system that typifies in most respects the punitive damage systems presently in place in most jurisdictions in the Nation. This case is also typical of many cases in many jurisdictions in which defendants suffer civil punishment for conduct that has not been declared to be punishable until after that conduct has occurred. Therefore, petitioner's Due Process Clause challenge

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[1] Petitioner granted consent for the filing of this brief *amicus curiae* by a letter on file with the Clerk. Respondent, however, refused to consent. Thus, this brief is accompanied by a motion for leave to file pursuant to Rule 37.2.

to the $500,000 punitive damage award raises important issues that are clearly worthy of this Court's review.

SUMMARY OF ARGUMENT

Defenders of the punitive damage systems in place in most jurisdictions have attempted to dissuade this Court from addressing the constitutional implications of those systems on the ground, *inter alia*, that the legislatures of many States are acting to alleviate the more capricious characteristics of these systems. Typically, the recipients of such windfall awards tell the Court that "at least 15 states have enacted legislation addressing punitive awards, some very recently" and ask the Court to infer from such vague assertions that its intervention would be "premature." *Browning-Ferris, supra*, Br. of Resp. in Opp., at 24-25.

As even a cursory examination of recent state legislative activity in this area reveals, however, one of the effects of this legislative activity has been to entrench more firmly the very flaws that have been of greatest concern to this Court. For example, tort reform statutes such as those enacted in Alabama in 1987 and Nevada in 1989 are so riddled with exceptions and uncertainty that they are virtually meaningless except as they provide legislative imprimaturs on punitive damage systems that continue to place unbridled power in juries and judges to punish defendants whose views, status or actions may be unpopular in general or in a particular case. And what the legislatures may enact may also be repealed, as illustrated by the recent action of the Montana legislature in repealing its then newly enacted limit on punitive damage awards.

Although often well-intentioned, most of the legislative activity in this area in the past four years has not done nearly enough to address the underlying features of the punitive damage systems that daily threaten to undermine the stability of contracts and fundamental economic relations. This Court, as it did in *Browning-Ferris*, should continue in this case its examination of the constitutional defects in the punitive damage regimes of Mississippi and other States because those defects have not been and are not likely to be cured by the States.

ARGUMENT

A. Introduction

The Court first suggested in 1986 that the imposition of unlimited punitive damages for ill-defined or previously undefined conduct raises "important" due process questions. *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986). Two years later in *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645 (1988), the Court declined to decide those questions, in part to avoid prematurely foreclosing "possibly more appropriate resolutions" of these serious problems. *Id.*, at 1651. The Court in *Bankers Life* suggested that state legislatures might choose to enact statutory limits and other meaningful controls on punitive damages. *Id.*, & n.3.

Despite the Court's expressions of concern over the lack of legislatively established standards governing the imposition of punitive damages, Mississippi, like the vast majority of States, has failed to establish fixed standards that provide fair warning to defendants of the maximum punishment to which they might be subjected for particular misconduct. In most

instances juries and judges remain free to impose punitive damages "guided by little more than an admonition to do what they think is best." *Browning-Ferris*, 109 S. Ct., at 2923 (Brennan, J., concurring). Juries and judges continue to have "discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state." *Bankers Life*, 108 S. Ct., at 1655 (O'Connor, J., concurring in part).

Since 1986, at least twenty-six States have enacted legislation relating to punitive damages. Only three of those States, however, have placed limits on the size of such awards in all cases. As discussed below, a few States, like Alabama, have established a maximum punitive fine for some types of cases (usually non-intentional tort cases), but have excluded from such maxima entire classes of cases in which juries and judges frequently impose excessively large punitive damage awards. In these latter classes of cases it remains that "[punitive] damages are the direct product of the ancient theory of unlimited jury discretion . . . ." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting).

The concerns expressed in *Aetna*, *Bankers Life* and *Browning-Ferris* regarding the important constitutional implications of these systems have largely gone and continue to go unheeded by state legislatures. For example, in February 1990, the Pennsylvania legislature passed and its Governor signed into law H.B. 121, § 3 of which authorizes "bad faith" actions and the imposition of unlimited punitive damages based upon a finding that an insurer "has acted in bad faith." *Pa. H.B.* 121, § 3, *amending Pa. Code*, ch. 83, tit. 42 (signed Feb. 7, 1990) (adding § 8371). That

legislation does not even purport to define the term "bad faith," which has heretofore not been defined by the Pennsylvania courts because those courts have refused to recognize a right of action for "bad faith." *See, e.g., D'Ambrosio* v. *Pennsylvania National Mutual Casualty Insurance Co.*, 431 A.2d 966 (Pa. 1981). The need for this Court to intervene is manifest.

B. Post-1986 Punitive Damage Legislation Has Generally Not Included Express Statutory Limits on the Size of Punitive Damage Awards

In most States that permitted the recovery of punitive damages as of 1983, the discretion of juries and judges was not proscribed by legislatively established limits on the amount of punishment that could be imposed. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269-79, 298-99, 314 (1983). Recent state legislation has produced few explicit, fixed limits on this otherwise unlimited discretion to administer civil punishment in the form of punitive damages. Defendants in the overwhelming number of punitive damage cases as petitioner in the case at bar, remain unprotected from arbitrary, unlimited and excessive punishments.

1. Legislation Applicable to All Punitive Damage Cases

Since 1986, Virginia's $350,000 limit on punitive damage awards in any action "accruing on or after July 1, 1988," *Va. Code Ann.* § 8.01-38.1 (Supp. 1988), is the only state enactment to establish a fixed dollar amount limit on punitive damage awards in all cases.

Although both Colorado and Kansas recently enacted provisions that establish *post hoc* "limits" on the size of the award, those "limits" do not enable defendants to ascertain *in advance* the amount of pun-

ishment to which they might be subjected. The Colorado legislation limits punitive damages to the amount of the compensatory award (or three times that amount if the misconduct continued during the trial). *Colo. Rev. Stat.* § 13-21-102 (1987). But in Colorado, as in most States, juries have virtually unlimited discretion to determine the amount of compensatory damages to be awarded. *See, e.g., Smith* v. *Hoyer*, 697 P.2d 761, 765 (Colo. App. 1984) ("The amount of actual damages is within the sole province of the jury, and an award will not be disturbed unless it is completely unsupported by the record.").

Similarly, the Kansas statute, *Kan. Stat. Ann.* § 60-3701(e) (Supp. 1988), prohibits the assessment of punitive damage awards in excess of the lesser of defendant's highest gross annual income during the five-year period preceding the misconduct, or $5,000,000. This statute paints with an extraordinarily broad brush, drawing no distinctions among the many types of conduct that might warrant punitive damages and the varying levels of punishment that would rationally be required to achieve the State's objectives of retribution and deterrence in diverse types of situations. Instead, the Kansas statute exposes persons to levels of punishment based upon their financial positions. Furthermore, if a Kansas court finds that the profitability of a defendant's misconduct exceeds or will exceed that amount, it may impose punitive damages up to 150% of the amount of a defendant's profit. *Id.*, § 60-3701(f).[2]

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[2] In 1986, New Hampshire statutorily prohibited the award of punitive damages in all actions "unless otherwise provided by statute." *N.H. Rev. Stat. Ann.* § 507:16 (Supp. 1988). However,

2. Legislation Expressly Excluding Certain Types of Cases from Statutory Limits

The $250,000 ceiling on punitive damages enacted by Alabama in 1987 does not apply to a wide array of cases—wrongful death cases, cases involving a pattern or practice of intentional conduct, cases involving "actual malice," and cases involving defamation, libel or slander. *See Ala. Code* § 6-11-21 & § 6-11-24, § 6-11-29 (Supp. 1988). In such cases, juries retain discretion to award punitive damages in any amount.

The limits established by Nevada Assembly Bill 307, which became effective on May 30, 1989, and which is now codified at *Nev. Rev. Stat.* 42.005, are similarly eviscerated by exceptions. That legislation provides that punitive damages may not exceed three times the amount of compensatory damages[3] if the amount of compensatory damages is $100,000 or more, or $300,000 if the compensatory damage award is less than $100,000. These limits are expressly inapplicable to two types of tort cases in which punitive damage awards are assessed with perhaps the greatest frequency and in the highest amounts—actions brought against a "manufacturer, distributor or seller of a

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prior to their abolition, "punitive" damages in New Hampshire had been regarded as serving a compensatory, rather than punitive, function. *See* K. Redden, *Punitive Damages* § 5.2(A)(29) (1980).

[3] As in Colorado, Nevada juries have extremely broad discretion to determine the amount of compensatory damages. *See, e.g., Miller* v. *Schnitzer*, 78 Nev. 301, 371 P.2d 824, 828-29 (1962) ("The extent of such damage, by its very nature, falls peculiarly within the province of the trier of fact, in this case, a jury. . . . The core of the matter seems to be that an appellate court will disallow or reduce the award if its judicial conscience is shocked; otherwise it will not.").

defective product" and as in the case at bar, an "insurer who acts in bad faith regarding its obligations to provide insurance coverage." Moreover, like Alabama, Nevada chose to exempt punitive damage awards in defamation actions. Environmental or other "toxic tort" cases are likewise excluded.

Similarly, the Georgia legislature in 1987 passed legislation that fixes a $250,000 limit on the size of punitive damage awards only in some non-intentional tort cases. *Ga. Code Ann.* § 51-12-5.1(g) (Supp. 1989). But this section expressly codified the common law rule that "[i]n a tort case in which the cause of action arises from *product liability, there shall be no limitation* regarding the *amount* which may be awarded as punitive damages." *Ga. Code Ann.* § 51-12-5.1(e)(1) (Supp. 1989) (emphasis added).[4] That legislation also exempts cases in which the defendant acted "with the specific intent to cause harm . . . . " *Ga. Code Ann.* § 51-12-5.1(f) (Supp. 1989).

Texas preserved the rule of unlimited punitive damages in its 1987 punitive damage legislation in cases involving intentional misconduct. Section 41.007 of the *Texas Civil Practice and Remedies Code* limits punitive damages to four times the compensatory award, or $200,000 (whichever is greater) *only* in cases in which gross negligence is the predicate for the punitive damage award. *Tex. Civ. Prac. & Rem. Code*

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[4] This provision allows recovery of only one punitive damage award in the courts of Georgia against a product liability defendant "for any act or omission" even if such conduct gave rise to multiple causes of action. *Id. See also Mo. Ann. Stat.* § 510.263(4) (Vernon Supp. 1989) (allowing defendant to seek "credit" for previously paid awards arising out of same conduct). Nonetheless, the amount of that single award is unlimited.

Ann. § 41.007 (Vernon Supp. 1989). In cases in which liability is based on an intentional tort, or "malice,"[5] punitive damages can be awarded in any amount. *Id.*, § 41.008.[6]

3. Legislation Establishing Limits That Can Be Avoided by a Showing of Clear and Convincing Evidence

As part of its general "tort reform" legislation, the Florida legislature in 1986 enacted *Fla. Stat. Ann.* § 768.73 (West Supp. 1989), which, *inter alia*, created a rebuttable presumption that an award of punitive damages that exceeds three times the amount of the compensatory damage award is "excessive," but did not establish a maximum limit on the size of punitive damage awards. *Fla. Stat. Ann.* § 768.73(1)(a)-(b) (West Supp. 1989). The jury is not informed of this presumption, and the jury's discretion to impose pu-

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[5] *Tex. Civ. Prac. & Rem. Code Ann.* § 41.001 broadly defines the term "malice" to include specific intent to cause injury as well as knowingly dangerous "flagrant disregard for the rights of others . . . ."

[6] A number of States have prohibited altogether the award of punitive damages in certain kinds of cases. *See, e.g., Ill. Ann. Stat.* ch. 110, ¶ 2-1115 (Smith-Hurd Supp. 1989) (medical malpractice); *Ore. Rev. Stat.* § 18.550 (1987) (actions against "health practitioners"). In addition, several have established a defense to punitive damages in product liability cases if the drug manufacturer complied with requirements of the Food and Drug Administration. *See, e.g, Tex. Civ. Prac. & Rem. Code Ann.* § 81.003 (Vernon Supp. 1989); *Ore. Rev. Stat.* § 30.927 (1987). On December 13, 1989, the Governor of Texas signed into law S.B. 1, § 10.42 of which limits punitive damage awards in "bad faith" workers' compensation cases to $250,000, or four times actual damages, whichever is greater. Connecticut has limited the amount of punitive damages to twice the compensatory damage award in product liability cases. *Conn. Gen. Stat.* § 52-240(b) (Supp. 1989).

nitive damages in the first instance is therefore not limited or constrained in any way. However, if the jury returns a punitive damage award that exceeds three times the amount of the compensatory damage award, the amount awarded may stand if "the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact." *Id.*, § 768.73(1)(b). This new legislation thus merely shifts and increases the burden of proof on the issue of excessiveness.

Title 23, § 9 (West 1987) of the *Oklahoma Statutes Annotated* provides that punitive damages may not exceed "the amount of actual damages awarded." However, this "percentage limitation on such damages . . . shall not apply" if "there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed . . . ." Thus, upon a "clear and convincing" showing plaintiffs in Oklahoma may seek, and judges and juries may impose, punitive damages in virtually any amount.

4. Legislation Removing Express Statutory Limits

In 1987, the State of Montana amended *Mont. Code Ann.* § 27-1-221 (1987), and reinstated the rule of unlimited punitive damages in all cases, which it had restricted only two years before to $25,000 or 1% of the defendant's net worth in cases not involving "actual fraud or actual malice."

5. Legislation Requiring That a Portion of the Award Be Paid to the State

Implicitly recognizing that punitive damages are imposed by governments for governmental purposes and

are intended to redress public wrongs rather than private injuries, a number of recently enacted statutes require that a portion of punitive damage awards be paid to the State. *See generally Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("Even assuming that a punitive 'fine' should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff—who by hypothesis is fully compensated."). While in theory these statutes may reduce the amount of a particular private plaintiff's windfall recovery of punitive damages, they do nothing to constrain the discretion of juries or courts to impose punitive damages in unlimited amounts. Indeed, in the absence of statutory limits, it is plausible to assume that juries may return even greater punitive damage awards in order to grant both a substantial windfall to plaintiffs and to fill their government's coffers with funds adequate to have an impact on their own tax bills.

At least seven States, Colorado, Florida, Georgia, Iowa, Missouri, Oregon, and Utah, now require that some portion of punitive damage awards (usually after deducting costs and attorneys' fees) be paid into a state fund. For example, the Florida statute requires that 60% of each punitive damage award imposed in a personal injury or wrongful death case be paid to the Public Medical Assistance Trust Fund and, in all other cases, to the State's General Reserve Fund. *Fla. Stat. Ann.* § 768.73(2) (West Supp. 1989). Similarly, in Georgia 75% of any punitive damage award must "be paid into the treasury of the state . . . ." *Ga. Code Ann.* § 51-12-5.1(e)(2) (Supp. 1989).[7]

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[7] *See also Colo. Rev. Stat.* § 13-21-102(4) (1987) (one-third of

Although these States have chosen to redirect a portion of the substantial sums awarded to punitive damage plaintiffs, these "reforms" exacerbate rather than resolve the troublesome constitutional problems raised by punitive damages. *See, e.g., Browning-Ferris*, 109 S. Ct., at 2914 & 2920 n.21 (leaving open the question whether the Excessive Fines Clause of the Eighth Amendment applies if a governmental entity prosecutes a claim for punitive damages or shares in an award of damages exacted for purposes of punishment); *id.*, at 2932-33 (O'Connor, J., concurring in part and dissenting in part) ("by relying so heavily on the distinction between governmental involvement and purely private suits, the Court suggests . . . that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity") (citing *Fla. Stat. Ann.* § 768.73(2)(b)).

C. The Punitive Damage Systems in Virtually All Jurisdictions Remain Fundamentally Unfair and Violative of the Due Process Clause

Statutory reforms to the Nation's punitive damage systems have made largely inconsequential inroads

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all reasonable punitive damages collected "shall be paid to the state general fund"); *Iowa Code Ann.* § 668A.1(2)(b) (West 1987) (if defendant's conduct was not specifically directed at the plaintiff, 75% of the punitive damage award goes to state civil reparations trust fund); *Mo. Ann. Stat.* § 537.675 (Vernon 1988) (50% of any final judgment awarding punitive damages deemed "rendered in favor of the state of Missouri"); *Ore. Rev. Stat.* § 18.540 (1987) (50% of punitive damage award "shall be paid to the Criminal Injuries Compensation Account"); *Utah Code Ann.* § 78-18-1(3) (Supp. 1989) (50% of any amount of punitive damages exceeding $20,000 must be "remitted to the state treasurer for deposit into the General Fund").

into the traditional province of juries and judges to award punitive damages on an *ad hoc* and subjective basis and have left completely unresolved the due process issues presented in *Aetna, Bankers Life, Browning-Ferris* and the case at bar. For example, several States have altered the rules of pleading with respect to punitive damages. Florida, Idaho, Illinois, Minnesota and North Dakota prohibit the pleading of punitive damages in an original complaint and generally require some sort of showing that there is a reasonable likelihood that the plaintiff will be able to establish a claim for punitive damages.[8] However salutary this change may be, it does not ameliorate the major constitutional problems presented by massive fines that are subjectively administered in unlimited amounts.

The "lack of sufficient standards governing punitive damage awards in Alabama" mentioned in *Aetna Life Insurance Co.* v. *Lavoie* as presenting an important due process issue has not been resolved in Alabama or elsewhere. Only six States—Alabama, Kentucky, Montana, California, New Jersey and Texas—have taken *any* legislative action to limit or attempt to define more precisely the conduct which may give rise to punitive damage liability. *See* J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* § 21.22 (1985) (section added March 1989). These attempts to define vague terms such as "malice," "fraud," "reck-

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[8] *Fla. Stat. Ann.* § 768.72 (West Supp. 1989); *Idaho Code* § 6-16-4(2) (1988); *Ill. Ann. Stat.* ch. 110, ¶ 2-604.1 (Smith-Hurd Supp. 1989); *Minn. Stat. Ann.* § 549.191 (West 1988); *N.D. Cent. Code* § 32-03-7 (Supp. 1989). Georgia now requires a specific prayer for punitive damages in the original complaint. *Ga. Code Ann.* § 51-12-5.1(d)(1) (Supp. 1989).

lessness" and "gross negligence" have resulted in standards that remain far from precise. For example, the California legislature in 1987 amended its statutory standards to require that conduct be "despicable" as well as "malicious" and "oppressive" to support punitive damages. *Cal. Civ. Code* § 3294(c) (Deering Supp. 1989). The 1987 Alabama legislation redefined the term "malice" to include, *inter alia*, the "intentional doing of a wrongful act without just cause or excuse . . . [u]nder such circumstances that the law will imply an evil intent," and "fraud" as an intentional misrepresentation "which was gross, oppressive or malicious." *Ala. Code* § 6-11-20(b) (Supp. 1988). But these statutes do little more than add new and highly subjective terms to already vague and subjective standards. And as noted above, the Pennsylvania legislature within the last six weeks authorized the imposition of unlimited punitive damages for insurance "bad faith" without any attempt to explain what conduct might constitute "bad faith" or otherwise to elucidate the scope or impact of its new statute.

Furthermore, these statutes do nothing at all to curb the imposition of punitive damages by state courts for conduct newly identified as worthy of punishment under evolving common law doctrine. *Amicus* is unaware of a single statute forbidding the imposition of punitive damages in the context of announcing such a new standard of conduct—one of the two central evils of the punitive damage system that petitioner asks this Court to review.

Although "punitive damages are 'quasi-criminal,' . . . their imposition is unaccompanied by the types of safeguards present in criminal proceedings."

Smith v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting). Since 1986, no State has legislatively adopted a standard of proof requiring that liability for punitive damages be established "beyond a reasonable doubt." Moreover, although a number of States recently have increased the burden of proof in at least some punitive damage cases from "preponderance of the evidence" to "clear and convincing evidence,"[9] two States, Idaho and New Jersey, have expressly codified the preponderance of the evidence standard in punitive damage cases.[10]

Recent punitive damage legislation in several States[11] requires some form of bifurcated trial in which either the claim for compensatory damages is bifurcated from the punitive damage claim or the jury's determination of punitive damage liability precedes its determination of the amount of the award. *Amicus curiae* supports the bifurcation of the compensatory and punitive phases of a trial. However, dividing the jury's assigned tasks into separate phases without placing effective controls on the size of awards leaves with the jury and judge the power to punish with unbridled authority. It appears that only three States, Connecticut, Kansas and Ohio, have placed statutory responsibility for setting the amount of the award solely in the hands of the trial judge

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[9] *See* J. Ghiardi & J. Kircher, *supra*, § 21.13 (listing ten states); *see also Nev. Rev. Stat.* § 42.005.

[10] J. Ghiardi & J. Kircher, *supra*, § 21.13.

[11] *See, e.g., Ga. Code Ann.* § 51-12-5.1 (Supp. 1989); *Nev. Rev. Stat.* § 42.005; *Mo. Ann. Stat.* § 510.263 (Vernon Supp. 1989); *Mont. Code Ann.* § 27-1-221 (1987); *N.J. Stat. Ann.* § 2A:58C-5 (West 1987); *Ohio Rev. Code Ann.* § 2315.21 (Anderson 1988).

once the jury (or judge) determines liability,[12] and the Connecticut provision is only applicable to products liability cases.

CONCLUSION

In the context of a system of punishment in which "responsible officials had deliberated and then agreed" as to "a range of penalties," *Browning-Ferris*, 109 S. Ct., at 2923 (Brennan, J., concurring), the limited reforms of state punitive damage law documented above might be regarded as noteworthy, if inadequate. In the absence of such considered legislative judgments, however, these ancillary measures suggest that state legislatures are not prepared to address and resolve the fundamental defects in the open-ended, common law punitive damage systems that continue to flourish across the Nation. This Court must do so, and the case at bar is an appropriate vehicle for the Court's resolution of these important issues.

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Respectfully submitted,

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[12] *See Kan. Stat. Ann.* § 60-3701(a) (Supp. 1988); *Ohio Rev. Code Ann.* § 2315.21(C)(2) (Anderson 1988); *Conn. Gen. Stat.* § 52-240(b) (Supp. 1989). *Compare ABA Standards for Criminal Justice*, Standard 18-1.1 *Commentary* (2d ed. 1980) (rejecting use of a jury in imposing a punishment in the criminal context).